Tiffany (NJ) Inc. et al v. eBay Inc. Doc. 73

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY,

Plaintiffs,

v.

eBAY INC.,

Defendant.

Case No. 04 Civ. 4607 (RJS)

DEFENDANT EBAY'S POST-TRIAL MEMORANDUM

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PRELIMINARY STATEMENT

Confronted with worldwide counterfeiting, Tiffany (suing here as Tiffany (NJ) Inc. and Tiffany & Co.) has chosen to make an object lesson, not of those responsible for the manufacture, importation, and attempted sales of such counterfeit merchandise, but instead of eBay, an entity that never possesses, itself trades in, or knowingly allows third-party users of its online trading platform to trade in counterfeit goods. Although trademark owners have a legal obligation vigorously to police their trademarks and pursue infringements, the trial record reveals that, in relation to its economic scale, Tiffany has devoted relatively few resources to that task. Over the last five years, Tiffany in fact has earmarked as much as one third of its entire anti-piracy budget to legal fees in this case, trying to establish that its policing responsibility – in particular, proactive monitoring for potential infringements – should principally be borne by third parties such as eBay. Trademark jurisprudence in general, and the doctrine of contributory infringement in particular, contemplate no such transference. Such burden-shifting would be particularly inappropriate here, where the record shows that eBay neither desires nor intends to profit from counterfeiting and in fact expends enormous amounts of money to combat such activity, not only in keeping with its legal obligations, but in fact far exceeding them.

The law delineates the limited responsibility placed upon parties other than those who may be engaging in acts of direct trademark infringement. An entity such as eBay cannot be held liable for contributory trademark infringement unless it is shown that it has actual knowledge or reason to know of specific infringing activity and has failed to act upon it. The trial record could not be more one-sided in this regard. Try as Tiffany might to obfuscate the issue, the evidence demonstrates that eBay has timely responded to essentially all of the Notices of Claimed Infringement ("NOCIs") transmitted by Tiffany – *never* having refused to cooperate (11/13/07 Tr. at 112:2-5 (Zalewska)), *always* accepting at face value Tiffany's "good-faith" assessments as to the infringing nature of the listings (Defendant's Exhibits ("DX") 34, 270), and *always* exhibiting its own good faith in the process (11/13/07 Tr. at 113:2-3 (Zalewska)).

The trial evidence establishing eBay's very substantial efforts to avert counterfeiting, going well beyond eBay's notice-and-takedown legal obligations, makes this lawsuit, and Tiffany's portrayals of eBay, all the more outlandish. That record reveals not only that eBay has been conscientious in responding to identified claimed infringements of Tiffany merchandise, but also that eBay invests many millions of dollars annually in an arsenal of weapons to combat infringing activity to the extent of its abilities. These efforts include the adoption and refinement of numerous proactive measures to identify listings of counterfeit items, the suspensions of tens of thousands of potentially infringing eBay users annually, and extensive cooperation with law enforcement agencies. See Chesnut Decl. ¶¶ 4, 15-24, 30-60.

It is remarkable, both against Tiffany's own history of inaction and the record evidence attesting to eBay's responsiveness to the issue of counterfeiting, that Tiffany would persist through trial with assertions that eBay has "turned a blind eye" to counterfeiting (11/13/07 Tr. at 20:5-6; Kowalski Decl. ¶ 18); that it has been "willful[ly] blind[]" to the presence of counterfeit Tiffany jewelry on its site (11/20/07 Tr. at 852:2-4); and that it has "ignored" the purported problem in its entirety (Zalewska Decl. ¶ 65). In the end, under oath, Tiffany's key witnesses had to concede the lack of support for such assertions. See 11/13/07 Tr. at 113:2-3 (Zalewska); 11/20/07 Tr. at 828:18-20 (Kowalski). Indeed, so one-sided is the record as to the scope and bona fides of eBay's anti-counterfeiting efforts overall that Tiffany's counsel himself was constrained at closing argument effectively to withdraw Tiffany's claims of bad faith and willful blindness, leaving behind instead the far more modest – though still incorrect – suggestion that what eBay has done wrong is to engage in "inadvertent" infringement. See 11/20/07 Tr. at 901:16-18.

We note as well Tiffany's utter inability to state a clear grievance against eBay. Not a single Tiffany witness could validate a central premise of Tiffany's case and the apparent foundation for the injunctive relief that Tiffany would seek: that listings of five or more Tiffany silver jewelry items "almost certainly" involve counterfeit merchandise. Instead, Tiffany's CEO was forced to concede that the five-or-more rule lacked any talismanic significance and represented only a "shorthand" "compromise" reflecting what Tiffany would seek from eBay – and one not warranting "undue focus" at that. See 11/20/07 Tr. at 817:3-4, 822:12-23 (Kowalski). Left unanswered by Tiffany is why eBay should be taken to task legally for assertedly failing to shape its response mechanisms around such an arbitrarily-determined litmus test for infringement. Tiffany's legal posture is all the more unfounded given that, in every instance in which Tiffany has identified listings falling within the five-or-more category and requested eBay to remove them, eBay has done so. See 11/14/07 Tr. at 243:7-21 (Zalewska).[1]

In the end, Tiffany's case is a barren one, both legally and factually. The record is unequivocal that eBay not only has acted consistently within the law's requirements when presented with claimed evidence of infringing listings and sellers, but voluntarily has gone far beyond what the law requires. The contention that eBay somehow has "turned a blind eye" to counterfeiting of Tiffany merchandise – and that it seeks to profit from sales of such

[1] Equally undermining of Tiffany's foundational contention is the fact that Tiffany's much-touted "buying programs" – the first of which is contended to have put eBay on notice of Tiffany's grievance – focused not at all on listings of five or more of the same items. See 11/14/07 Tr. at 282:13-17 (Mantis). Nor could Tiffany's expert, Dr. Gregory Piatetsky-Shapiro, claim that anyone who had listed five or more Tiffany jewelry items is definitely *or even likely* a "suspicious" seller. See 11/14/07 Tr. at 335:11-14 (Piatetsky-Shapiro).

merchandise – is refuted by the record evidence of a concerted, multi-year effort on eBay's part to rid its site of counterfeiting within the limits of its abilities. If only, as eBay's Robert Chesnut testified, Tiffany would devote more energy to partnering with eBay in combating counterfeiting, rather than diverting its resources into bringing expensive and wasteful litigation such as this, there is every reason to believe that the already significantly-reduced incidences of counterfeit Tiffany merchandise appearing on the eBay website would be further minimized.

ARGUMENT

I. TIFFANY IMPROPERLY ATTEMPTS TO SHIFT ONTO EBAY THE POLICING OBLIGATION IMPOSED UPON TIFFANY BY LAW

Notwithstanding the allocation of burdens under the law and the paramount importance to Tiffany of its trademarks, Tiffany has argued that "it should be eBay's burden, not Tiffany's, to police eBay's marketplace" for Tiffany's trademarks. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion in Limine to Exclude the Proposed Expert Testimony of George Mantis (filed Nov. 20, 2006) ("Pl. in Limine Opp.") at 16 n.11. Tiffany's position improperly invites this Court to turn settled trademark concepts on their head.

It is well established that as a prerequisite to the protection of their intellectual property rights, trademark owners have the duty to police their trademarks. See J. Thomas McCarthy, 2 McCarthy on Trademarks and Unfair Competition § 11:91 (2006) ("[C]orporate owners of trademarks have a duty to protect and preserve the corporation's trademark assets through vigilant policing and appropriate acts of enforcement."); eBay PCL ¶ 9.[2] It is, most notably, the trademark owner that has the primary economic interest in the goodwill associated

[2] Where eBay previously discussed relevant legal principles in its pretrial filings, we cite to those discussions. See Defendant eBay's Proposed Conclusions of Law (filed April 2, 2007) ("eBay PCL"); Defendant eBay's Pretrial Memorandum (filed April 2, 2007) ("eBay Mem."); Defendant eBay's Opposition to Tiffany's Pretrial Memorandum (filed April 24, 2007) ("eBay Opp.").

with its trademark and that possesses the ability to identify its own merchandise and distinguish imitations. See Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997).

Courts confronted with efforts by rights holders to shift their policing responsibilities onto innocent third parties, such as that engaged in by Tiffany here, have not hesitated to reject such efforts. As the court in MDT Corp. v. New York Stock Exch., 858 F. Supp. 1028 (C.D. Cal. 1994), aptly observed in rebuffing a rights holder's attempt "to impose an affirmative duty on innocent third party users of a mark to police the mark for its owner": "No such duty exists. . . . [T]he contributory infringement doctrine . . . does not extend so far as to require non-infringing users to police the mark for a trade name owner. The owner of a trade name must do its own police work." Id. at 1034. See also Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1149 (7th Cir. 1992) (defendants are not required "to be more dutiful guardians of [trademark plaintiffs'] commercial interests").[3]

Prior to instituting the instant lawsuit, Tiffany acknowledged the law's allocation of policing burdens. Ewa Zalewska thus stated to an eBay user in 2003 that "[i]t is up to trademark and copyright owners themselves to monitor and police the auctions." DX 163; 11/13/07 Tr. at 85:22-86:8 (Zalewska). Only Tiffany, after all, has the necessary expertise and resources – including tools, trained evaluators, access to catalogues, and so on – to distinguish between authentic and counterfeit Tiffany products. See Headley Decl. ¶¶ 13-16; Callan Decl.

[3] Were Tiffany's view of the law to prevail, it would potentially wreak havoc on businesses that, in formulating and refining their business models, have relied upon the settled law that Tiffany now seeks to overturn. Such an outcome would have a particularly adverse impact on the continuing development of the Internet, which the Supreme Court expressly has sought to nurture. See Reno v. American Civil Liberties Union, 521 U.S. 844, 885 (1997) (recognizing that "fostering the growth of the Internet" calls for minimizing "governmental regulation"). See also Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) ("Just as the telephone company is not liable as an aider and abettor for tapes or narcotics sold by phone, and the Postal Service is not liable for tapes sold (and delivered) by mail, so a web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet.").

¶¶ 5-13; DX 227 ("No jeweler can verify our pieces for authenticity – they may only be verified by our Quality Assurance Division.").[4] eBay has no comparable expertise, particularly without the ability to examine the physical item. See 11/13/07 Tr. at 31:11-32:14, 69:25-70:17 (Callan); Zalewska Decl. ¶ 41; 11/13/07 Tr. at 97:2-12 (Zalewska); Zalewska Deposition at 24:12-25:7; Briggs Decl. ¶¶ 10-12, 19.

Tiffany claims that counterfeiting is a critical problem that company management is committed to "tak[ing] all necessary steps" to combat, Kowalski Decl. ¶ 5, yet Tiffany has devoted only a tiny fraction of one percent of its annual revenues to that effort. In fiscal year 2003, Tiffany budgeted some $763,000 to the issue, representing less than 0.05 percent of its net sales for that year. See DX 200; 11/13/07 Tr. at 94:11-14 (Zalewska). On the witness stand, Tiffany's CEO, Mr. Kowalski, represented that over the past five years, when Tiffany's net sales have exceeded $11 billion, see DX 149-153, Tiffany has budgeted $14 million in total to anti-counterfeiting efforts – of which $3-5 million has been devoted to litigating this case. See 11/20/07 Tr. at 825:21-826:21 (Kowalski). Net of the amount spent on the instant litigation, over the reported time period, Tiffany's expenditures in this area have represented less than 0.10 percent of its net sales.

This limited commitment to fighting counterfeiting has carried over into the resources Tiffany has devoted to limiting listings of potentially counterfeit items on the eBay website itself. Indeed, through much of the period of this lawsuit, Tiffany's reporting via eBay's VeRO ("Verified Rights Owner") Program was sporadic and inconsistent at best – reflecting the

[4] As George Callan testified, determining whether a Tiffany jewelry item is authentic requires significant training on the qualities of Tiffany product offerings. See 11/13/07 Tr. at 32:7-14 (Callan); Headley Deposition at 19:14-21:4, 22:11-23:3. Tiffany's Quality Assurance personnel are taught to consider many detailed attributes and to use a broad array of tools, tests, and internal resources. See 11/13/07 Tr. at 41:22-43:13, 49:3-50:12 (Callan); Plaintiffs' Exhibits ("PX") 1139-1144 and 284 at TCO 029499; DX 174, 182.

time of paralegal assistants, legal interns, or security department employees devoting part or all of one or two days a week to the task. See Zalewska Decl. ¶ 17; 11/13/07 Tr. at 78:2-13 (Zalewska); 11/16/07 Tr. at 612:19-614:10 (Chesnut). Tiffany did not begin reporting with any degree of regularity until some time in 2006, and even at the height of its efforts Tiffany devoted only the equivalent of 1.06 to 1.48 full-time employees (mainly at the paralegal level) to submitting NOCIs. See 11/14/07 Tr. at 188:1-3 (Zalewska); Zalewska Decl. ¶ 67. While Tiffany complains of the asserted inadequacies of the VeRO reporting system – in Mr. Kowalski's words, "too little too late," 11/20/07 Tr. at 819:3-10 (Kowalski) – the record facts demonstrate exceptional responsiveness on eBay's part to the more than 284,000 NOCIs submitted by Tiffany and few instances of recidivists. And while Tiffany further contends that it is resource-constrained in devoting additional resources to VeRO reporting (see Zalewska Decl. ¶¶ 67, 78; 11/13/07 Tr. at 73:19-25, 83:9-84:10 (Zalewska); 11/20/07 Tr. at 800:20-801:21, 802:5-17 (Kowalski)), Tiffany could more than amply have funded – at an estimated $50,000 per man-year – additional paralegal-type resources enabling comprehensive monitoring of the eBay site for a small fraction of the millions of dollars it has spent on this litigation.[5]

The trial record further reveals that Tiffany has taken remarkably few actions directed against offending eBay sellers – even sellers of items that Tiffany determined were counterfeit pursuant to its buying programs, the alleged recidivist sellers listed in PX 1067, and the seller who allegedly listed over 3,000 counterfeit Tiffany items on eBay. See 11/20/07 Tr. at

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[5] Mr. Chesnut testified to his belief that had Tiffany devoted more ample resources to the effort, over time the number of potentially counterfeit Tiffany items on eBay would be minimal. See 11/16/07 Tr. at 624:24-626:20, 719:25-721:7 (Chesnut); Chesnut Decl. ¶ 25. As Mr. Chesnut explained: "If you're a counterfeiter and you put listings up and somebody is not reporting them every day or two days or three days, that gives them a span in order to successfully sell items. As opposed to somebody reporting on an everyday basis, if the listings go up, they can take them down, that has a discouraging effect on what they do." 11/16/07 Tr. at 626:6-12 (Chesnut). See also id. at 719:25-721:7; Chesnut Decl. ¶¶ 5-6.

800:20-801:1, 804:11-806:13, 830:8-17 (Kowalski).[6] As later discussed, this quite passive record stands in stark contrast to eBay's own active enforcement initiatives directed against offending sellers – which results in hundreds of thousands of suspensions yearly, tens of thousands of which are for infringing conduct of the type complained of here by Tiffany.

II. TIFFANY HAS FAILED TO PROVE THAT EBAY HAS CONTRIBUTORILY INFRINGED UPON ITS TRADEMARKS

A. Contours of the Doctrine of Contributory Trademark Infringement

Both parties agree that the Supreme Court's decision in Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844 (1982), governs this Court's determination of eBay's potential liability for contributory trademark infringement. See 11/20/07 Tr. at 849:2-10, 852:13-14, 877:4-9. But whereas eBay presented evidence at trial directly responsive to Inwood's governing test, Tiffany paid mere lip service to it. The trial record reveals that eBay has acted appropriately in responding to Tiffany NOCIs that provide eBay with the requisite knowledge of alleged infringement required under Inwood. To blunt the force of this evidence, Tiffany seeks to redefine and broaden Inwood's knowledge standard such that any form of generalized communication – however vague or non-specific – that an infringement problem exists would allow the trademark owner to transfer its own responsibility for policing and identifying future infringing acts to the party that received the general notification. The doctrine of contributory liability is far more circumscribed.

Articulating the standard for claims of contributory trademark infringement, the Inwood Court stated: "[I]f a manufacturer or distributor . . . continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit." Inwood, 456 U.S. at 854. See also eBay PCL ¶¶ 12-27; eBay Mem. at 12-22; eBay Opp. at 2-9. Inwood's confinement of the reach of secondary liability to the circumstance in which the defendant "continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement," Inwood, 456 U.S. at 854, requires a showing that the defendant possessed specific knowledge of infringing conduct on which the defendant failed to act. See, e.g., Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 807 (9th Cir. 2007) ("a defendant must have . . . continued to supply an *infringing product* to an infringer with knowledge that the infringer is mislabeling *the particular product supplied*") (emphasis added); American Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1433 n.14 (3d Cir. 1994) (no liability where defendant "took appropriate steps" "in the instances *where [plaintiff] brought objectionable acts* . . . to the attention of [defendant]") (citation and quotation marks omitted) (emphasis added); Nintendo of Am. Inc. v. Computer & Entm't, Inc., Civ. No. C 96-0187 WD, 1996 WL 511619, at *5 (W.D. Wash. May 31, 1996) ("Contributory trademark liability is applicable if a defendant . . . *continues to supply a product* knowing that the recipient is *using the product* to engage in trademark infringement.") (emphasis added). See also 4 McCarthy on Trademarks and Unfair Competition § 25:20 (noting recent scholarship on contributory infringement claims against online service providers concluding that "trademark owners may have a difficult road in establishing liability unless notice of specific infringements was unheeded by the service provider") (internal quotation marks and citation omitted).

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[6] Mr. Kowalski's declaration mentioned two such lawsuits. See Kowalski Decl. ¶¶ 15-16. On the witness stand, he stated that two additional suits had been brought – but, until prompted by Tiffany's counsel, was unable to identify them, and the record is otherwise silent as to the nature of these other actions. See 11/20/07 Tr. at 800:1-19 (Kowalski).

The trademark law requirement of specific knowledge of infringing conduct is in line with the treatment of the concept of knowledge under the doctrine of contributory copyright infringement, to which courts have looked for guidance in examining questions of contributory trademark liability.[7] In particular, copyright jurisprudence requires specificity of knowledge. See eBay PCL ¶¶ 28-29; eBay Mem. at 15-16; eBay Opp. at 5. The court in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001), accordingly held that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement," and that "absent any specific information which identifies infringing activity, a computer system operator cannot be liable."[8]

Brought home here, eBay cannot be held liable for contributory trademark infringement unless the trial record demonstrates that eBay possessed actual knowledge or reason to know of specific infringements (*i.e.*, counterfeit listings of Tiffany merchandise) *and* failed to act on that knowledge. There is absolutely no record support for this conclusion; to the contrary, as we next discuss, eBay has an exemplary record of responding to identified instances of claimed infringements brought to its attention by Tiffany.

B. The Pertinent Record Evidence Under Inwood

The record is uncontroverted that, once notified by Tiffany that a listing may contain infringing merchandise, eBay has removed that listing from its site. This is in keeping with eBay's practice of removing thousands of listings per week based on NOCIs submitted by rights owners as part of eBay's VeRO Program – one of the first such systems, as well as one of the most extensive and effective, developed by any online trading platform. See 11/16/07 Tr. at 747:20-748:23 (Chesnut); Chesnut Decl. ¶¶ 13, 21; DX 29, 84. eBay's practice is to remove reported listings within 24 hours, with about 95 to 99 percent removed during that time; 70 to 80 percent of reported listings were removed within 12 hours of notification during the course of the litigation, and nearly three-quarters are currently removed within four hours. See 11/16/07 Tr. at 712:7-713:3, 716:24-719:24 (Chesnut); Chesnut Decl. ¶ 21; DX 26.

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[7] Even as courts look to these copyright principles, they recognize that the doctrine of contributory trademark infringement is even narrower than its copyright counterpart. See, e.g., Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 806 ("The tests for secondary trademark infringement are even more difficult to satisfy than those required to find secondary copyright infringement."). See also eBay PCL ¶¶ 28-29; eBay Mem. at 15-16; eBay Opp. at 5.

[8] Because such specificity is required, courts have rejected the premise that "[t]he mere existence" of a service can give rise to contributory copyright liability. Id. at 1027. In this vein, the court in Lifetime Homes, Inc. v. Residential Dev. Corp., 510 F. Supp. 2d 794, 808 (M.D. Fla. 2007), recently rejected the argument that Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996), stands for the "proposition that a defendant is liable for contributory infringement simply by providing the forum in which the infringing activity occurs."

eBay's response to NOCIs goes well beyond removing the reported listing. If bidding on the listed item has not ended, eBay notifies the seller and any bidders that the listing has been removed and that all bids have been cancelled. eBay also advises the seller as to the reason for the removal and provides relevant educational information to prevent the seller from later committing the same violation. See 11/16/07 Tr. at 697:20-699:5 (Chesnut); DX 55. If bidding has ended, eBay "cancel[s] the transaction retroactively," removes the listing, and informs both the winning bidder and the seller that the listing has been ended and that the parties should not complete the transaction. See 11/16/07 Tr. at 703:17-704:5 (Chesnut). In addition, every time eBay removes a listing, eBay refunds associated fees, including listing fees, feature fees, and final value fees. See id. at 699:4-14, 703:17-704:5; Chesnut Decl. ¶ 22. eBay also reviews the seller's account and routinely takes further remedial action, including suspensions (as discussed further below). See 11/16/07 Tr. at 699:22-700:9 (Chesnut). eBay offers a buyer protection program as well. See id. at 704:6-17; Chesnut Decl. ¶¶ 58-60.

Tiffany has conceded that eBay acts appropriately when it is notified by Tiffany of an infringing item: eBay has *never refused to remove a reported listing* and has always acted in good faith. See 11/13/07 Tr. at 112:2-7, 146:10-14 (Zalewska). Ms. Zalewska in fact testified that, for at least 90 percent of reported listings, eBay acted promptly on the listings such that no follow-up was required. See id. at 101:7-19. The balance of the evidence indicates that eBay's batting average is even better. At her deposition, Ms. Zalewska stated that between 2003 and July 2005, *fewer than fifty of the roughly 100,000* NOCIs that Tiffany had submitted required follow up. See id. at 97:13-98:15; PX 1082. Tiffany's John Pollard likewise testified at his deposition that he was not aware of *any* instances in which eBay failed to remove a reported listing. See Pollard Deposition at 34:7-11.[9]

Tiffany's sole documentation evidencing the ostensible need to follow up on NOCIs took the form of fifteen litigation-inspired sets of requests – all dated two weeks before the parties' joint pretrial order was due – none of which, on examination, constitutes a claim that a listing had not in fact been timely removed. See PX 1120-34. See also 11/16/07 Tr. at 724:9-726:9 (Chesnut). What is more, in all fifteen instances, the offending listings were actually taken down either before or within a day of eBay's receipt of the original notice of infringement, in each case before a follow-up request was sent. See id. at 726:10-727:6, 727:14-728:10.

The foregoing record evidence suffices to defeat Tiffany's case for contributory trademark liability. As we next discuss, so much of the remaining evidence on which Tiffany would prefer to rely is of no legal import – although, in any event, it entirely supports eBay.

[9] In a 2004 *Loss Prevention* magazine article written by Mr. Pollard and Tiffany's David McGowan, Tiffany stated that, by using the VeRO Program, Tiffany was able to successfully reduce the number of potentially counterfeit Tiffany items on eBay. See DX 196. Indeed, in pre-complaint communications with eBay buyers and sellers, Tiffany praised eBay for its cooperation and helpfulness. See, e.g., DX 185 ("We have worked with e-Bay for quite some time. They allow us to determine whether an auction infringes on our trademark. They will not allow an item to be re-listed if we say not to.").

III. TIFFANY'S ATTEMPTED REFORMULATIONS OF THE GOVERNING TEST FOR CONTRIBUTORY TRADEMARK INFRINGEMENT LACK MERIT

A. The Law Does Not Require eBay to Have Acted in "Reasonable Anticipation" of Possible Infringing Conduct

1. Judicial rejection of "reasonable anticipation" as a basis for knowledge

As emphasized in its closing argument, Tiffany tries to circumvent the directly-controlling Inwood precedent by reference to a pre-Inwood, pre-Lanham Act district court decision whose reasoning Tiffany claims is supported by Section 27 of the Restatement (Third) of Unfair Competition (1995). Tiffany principally relies upon Coca-Cola Co. v. Snow Crest Beverages, Inc., 64 F. Supp. 980 (D. Mass. 1946), aff'd, 162 F.2d 208 (1st Cir. 1947), combined with the language of the Restatement, to establish the proposition that, purportedly being generally aware that infringements of Tiffany's trademarks are occurring on eBay's website, eBay thereby could have "reasonably anticipated" further infringements occurring and thus was required to take "reasonable precautions" to prevent them by proactively searching for potentially infringing Tiffany listings.

We note at the outset that the case law rejects any generalized conception of knowledge as a basis for establishing contributory trademark infringement and makes clear that entities such as eBay have no duty to act in the absence of specific knowledge. As Justice White stated in his concurrence in Inwood, a defendant is not "require[d] . . . to refuse to sell to dealers who merely *might* pass off its goods. . . . The mere fact that a [defendant] can anticipate that some illegal substitution will occur to some unspecified extent, and by some unknown [direct infringers], should not by itself be a predicate for contributory liability." Inwood, 456 U.S. at 861 (White, J., concurring) (emphasis in original; internal quotation marks omitted). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 n.19 (1984) (emphasizing

"Inwood's narrow standard for contributory trademark infringement"); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 420 (S.D.N.Y. 2001) (citing Inwood and recognizing that "trademark plaintiffs bear a high burden in establishing 'knowledge' of contributory infringement"). In keeping with these mandates, the court in Monsanto Co. v. Campuzano, 206 F. Supp. 2d 1271 (S.D. Fla. 2002), as but one example, refused to impose liability on the basis of the defendant's general awareness of related infringing activity by other third parties engaged in a "repackaging scheme," noting instead, for instance, that "[e]vidence that [defendant] had knowledge that at some time unknown individuals engaged in an unrelated repackaging scheme in another state is not evidence that [defendant] knew or should have known" of infringing activity. Id. at 1278. See also eBay PCL ¶¶ 12-17; eBay Mem. at 12-17; eBay Opp. at 2-5.

Relatedly, the governing case law instructs that there is no obligation on eBay's part to proactively monitor its site. Courts uniformly have held that entities like eBay have "no affirmative duty to take precautions against the sale of counterfeits." Hard Rock, 955 F.2d at 1149. See also Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1095 (C.D. Cal. 2001) (holding that eBay "has no affirmative duty to monitor its own website" for potential intellectual property violations); Robespierre, Inc. a/k/a "Nanette Lepore" v. eBay Inc., 05 CV 10484 (GBD) (S.D.N.Y. Mar. 29, 2006) (March 29, 2006 Hearing Transcript at 9) (attached as Exhibit A to the Declaration of Randi W. Singer, dated April 2, 2006 submitted in support of eBay's Pretrial Memorandum). "[A] claim for contributory infringement *must fail* if it depends on imposing upon [defendant] an affirmative duty to police the mark for a trade name owner." Lockheed Martin Corp. v. Network Solutions, Inc., 175 F.R.D. 640, 646 (C.D. Cal. 1997) (emphasis added) (internal quotation marks and citation omitted). See also eBay PCL ¶¶ 19-22; eBay Mem. at 18-19; eBay Opp. at 2-5.

Even more conclusive against Tiffany's Coca-Cola/Restatement argument is the fact that the Supreme Court in Inwood expressly rejected such a basis for imposing contributory trademark liability. Specifically, in a concurring opinion in Inwood, Justice White raised the concern that the majority had implicitly adopted a "reasonable anticipation" standard for contributory infringement. This concern arose out of Justice White's view that the Second Circuit Court of Appeals, in the latter of two opinions by that court ("Ives IV"), had impermissibly "revis[ed] and expand[ed] the doctrine of contributory trademark infringement" beyond what that court, per Judge Friendly, had properly articulated in its earlier decision ("Ives II"). Inwood, 456 U.S. at 860 (White, J., concurring).[10]

In Ives II, Judge Friendly correctly stated the governing standard for contributory liability as follows:

> The authorities later reviewed indicate to us that a manufacturer or wholesaler would be liable under § 32 if he suggested, even if only by implication, that a retailer fill a bottle with the generic capsules and apply Ives' mark to the label, or continued to sell capsules containing the generic drug which facilitated this to a druggist whom he knew or had reason to know was engaging in the practices just described.

Ives Labs. Inc. v. Darby Drug Co., 601 F.2d 631, 636 (2d Cir. 1979) (Friendly, J.). In Ives IV, while Judge Mansfield stated that "the governing legal principles have already been set forth in Judge Friendly's opinion upon the earlier appeal," Ives Labs., Inc. v. Darby Drug Co., 638 F.2d 538, 542 (2d Cir. 1981) (Mansfield, J.), he also suggested that the defendants "could reasonably anticipate" infringement, id. at 543.

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[10] Per Justice White: "Ives II required a showing that petitioners intended illegal substitution or knowingly continued to supply pharmacists palming off [goods]; Ives IV was satisfied merely by the failure to 'reasonably anticipate' that illegal substitution by some pharmacists was likely. In my view, this is an erroneous construction of the statutory law governing trademark protection." Id. See also id. at 861 ("The mere fact that a generic drug company can anticipate that some illegal substitution will occur to some unspecified extent, and by some unknown pharmacists, should not by itself be a predicate for contributory liability.").

Against this backdrop, the majority in Inwood responded to Justice White's concern by stating that the Court of Appeals in Ives IV had not in fact adopted a "reasonable anticipation" standard and that, had it done so, that standard would have been erroneous:

> Justice White, in his opinion concurring in the result, voices his concern that we may have "silently acquiesce[d] in a significant change in the test for contributory infringement." His concern derives from his perception that the Court of Appeals abandoned the standard enunciated by Judge Friendly in its first opinion, a standard which both we and Justice White approve. The Court of Appeals, however, expressly premised its second opinion on "the governing legal principles . . . set forth in Judge Friendly's opinion upon the earlier appeal" and explicitly claimed to have rendered its second decision by "applying those principles." Justice White's concern is based on a comment by the Court of Appeals that the generic manufacturers "could reasonably anticipate" illegal substitution of their drugs. If the Court of Appeals had relied upon that statement to define the controlling legal standard, the court indeed would have applied *a "watered down" and incorrect standard.* As we read the Court of Appeals' opinion, however, that statement was intended merely to buttress the court's conclusion that the legal test for contributory infringement, as earlier defined, had been met.

Id. at 854 n.13 (citations omitted) (emphasis added). Modern courts, following Inwood, have rejected the "reasonable anticipation" approach. See eBay PCL ¶ 18; eBay Mem. at 13-14; eBay Opp. at 10-13.[11]

Against this authority, Tiffany cites, for its contention that the "reasonable anticipation" standard remains a viable one, a handful of inapposite cases. See Tiffany Proposed Conclusions of Law ("Tiffany PCL") ¶¶ 33, 35, 38. First, Hard Rock, 955 F.2d at 1149, and

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[11] See also Procter & Gamble Co. v. Haugen, 158 F. Supp. 2d 1286, 1294 (D. Utah 2001), aff'd, 317 F.3d 1121 (10th Cir. 2003); Medic Alert Found. U.S., Inc. v. Corel Corp., 43 F. Supp. 2d 933, 940 (N.D. Ill. 1999); Lockheed, 175 F.R.D. at 646; David Berg & Co. v. Gatto Int'l Trading Co., Inc., No. 86 C 10297, 1988 WL 117493, at *5 (N.D. Ill. Oct. 24, 1988), aff'd, 884 F.2d 306 (7th Cir. 1989). Academic literature on the subject also recognizes the rejection of the "reasonable anticipation" theory. See, e.g., Edward H. Cooper, Civil Rule 50(a): Rationing and Rationalizing the Resources of Appellate Review, 63 Notre Dame L. Rev. 645, 667 (1988) (stating that the Inwood Court "ruled that liability could not rest on showing that illegal substitution could be reasonably anticipated").

Winback, 42 F.3d at 1433, do not address the "reasonable anticipation" theory whatsoever; they instead merely note the uncontroversial proposition that common law principles may be relevant to contributory liability. Tiffany also cites Hard Rock among a group of cases that address the entirely distinct concept of willful blindness, not "reasonable anticipation." See Hard Rock, 955 F.2d at 1149 (willful blindness exists where a defendant "suspect[s] wrongdoing and deliberately fail[s] to investigate"); Louis Vuitton v. Lee, 875 F.2d 584, 590 (7th Cir. 1989) (defendant "failed to inquire further because [she] was afraid of what the inquiry would yield"); Tommy Hilfiger Licensing, Inc. v. Goody's Family Clothing, Inc., No. 1:00-CV-1934-BBM, 2003 WL 22331254, at *18-22 (N.D. Ga. May 9, 2003) (defendant "purposefully contrived to avoid learning of the illegal activity"). (We discuss below the lack of merit in Tiffany's separate "willful blindness" allegations.)

The remaining two cases cited by Tiffany are equally wide of the mark. Specifically, United States v. Chemicals for Research & Indus., 10 F. Supp. 2d 1125 (N.D. Cal. 1998), involved interpretation of a provision of the Controlled Substances Act and bore no relation to contributory trademark liability. And the district court's decision in Fonovisa, Inc. v. Cherry Auction, Inc., 847 F. Supp. 1492 (E.D. Cal. 1994), rev'd on other grounds, 76 F.3d 259, was premised on a conclusion (later reversed) that a defendant's "reason to know" of infringing activity could *not* suffice for contributory trademark liability; the court was entirely silent as to "reasonable anticipation."

2. Lack of evidence supporting Tiffany's reliance on a "reasonable anticipation" standard

Even were eBay subject to a "reasonable anticipation" standard, which it is not, Tiffany still could not prevail in this action because it has failed to prove either that eBay reasonably anticipates listings of counterfeit Tiffany goods or, conclusive in and of itself, that eBay fails to take reasonable precautions to prevent such listings. The mere possibility that some third-party users may list items on eBay that *might* be counterfeit does not impart liability on eBay under this purported test. Coca-Cola is in accord: the court there rejected liability on the basis that a defendant may know that "there are some unscrupulous persons who . . . will palm off on customers a different product." Coca-Cola, 64 F. Supp. at 988-89.

In any event, eBay does not "fail[] to take reasonable precautions against the occurrence of the third person's infringing conduct." Restatement (Third) of Unfair Competition § 27. Under this proposed formulation of the law, an entity like eBay "is obligated to take only those precautions that are reasonable under the circumstances." Id. § 27 cmt. c. The facts established at trial demonstrate that eBay would more than satisfy such a test; the record establishes that eBay takes extensive precautions against infringing activity, and any suggestion to the contrary is insupportable. What is more, Coca-Cola itself held that the "defendant was not under a duty to investigate possible passing off . . . , or to take steps to safeguard against such passing off, or to eliminate or curtail sales of its product." Coca-Cola, 64 F. Supp. at 989.[12]

[12] Relatedly, the Seventh Circuit in Hard Rock reversed the district court's conclusion that the defendant "'must . . . take reasonable precautions against the sale of counterfeit products,'" Hard Rock, 955 F.2d at 1148 (quoting district court opinion; citation omitted), holding instead that a defendant cannot be liable "for failing to take reasonable precautions," id. at 1149.

B. Tiffany's Remaining Bases for Imposing on eBay an Affirmative Obligation to Act Are Equally Extraneous to the Determination of Liability

1. Tiffany's non-specific demand letters to eBay

Tiffany makes much of the fact that it sent two demand letters to eBay that, it contends, eBay chose to ignore. But insofar as listings of counterfeit Tiffany merchandise are concerned, the letters failed to provide eBay with anything other than general notice of claimed infringements. Tiffany identified no specific listings or sellers, even though it plainly was in a position to do so.

Courts repeatedly have refused to recognize such forms of general notice as the basis for satisfying Inwood's knowledge requirement. See Gucci, 135 F. Supp. 2d at 411, 420 (trademark owner's two emails to defendant regarding allegedly infringing activity did not establish knowledge); Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 967 (C.D. Cal. 1997), aff'd, 194 F.3d 980 (9th Cir. 1999) ("[e]ven after receiving [plaintiff's] demand letters [defendant] would not have reason to know" of infringing activity); Fare Deals, Ltd. v. World Choice Travel.com, Inc., 180 F. Supp. 2d 678, 690-91 (D. Md. 2001) (plaintiff's demand letter cannot establish knowledge for purposes of contributory trademark infringement). See also eBay PCL ¶ 16; eBay Mem. at 14.

Coca-Cola itself rejected the argument that a plaintiff's non-specific demands impute knowledge on a defendant. The court there addressed a meeting where plaintiff's counsel complained to the defendant's president of the defendant's business transactions with bars alleged to be directly infringing the plaintiff's trademark rights. The court held that no knowledge arose from these complaints, particularly insofar as "[p]laintiff's counsel . . . did not give the names or the number of any offending bars," "did not inform defendant of the details of the investigation of the 82 bars," and "did not ask defendant to take any specific step to notify or caution bars against passing off." Coca-Cola, 64 F. Supp. at 987. Tiffany's demand letters – which lack any specifics – are of this very nature. See PX 489, 490, 492.

In any event, the record shows that eBay both was addressing the issue of listings of potentially counterfeit merchandise on its site from a time well before Tiffany's demand letters, see 11/16/07 Tr. at 741:23-742:23 (Chesnut), and, moreover, did not ignore that correspondence. Even before Tiffany contacted eBay, eBay "was already working on measures, both some short-term measures and some long-term measures to try to effectively deal with the problem" of potentially counterfeit goods listed on its site. See id. Following receipt of Tiffany's letters, eBay undertook further "efforts to reduce the volume" of potentially infringing Tiffany items. See id. at 742:24-746:20.[13] eBay also implemented Tiffany-specific filters in its fraud engine, see id. at 664:2-22; DX 125, and created special warning messages that appear when a seller attempts to list an item with "Tiffany" in the listing title, see 11/16/07 Tr. at 750:16-752:21 (Chesnut); Chesnut Decl. ¶ 55; DX 136.

2. Tiffany's inconsequential buying programs

Tiffany makes the related argument that the pre-complaint notice it imparted to eBay as to the overall results of its 2004 buying program sufficed to impose upon eBay the obligation to search for similar future potential infringements. As a legal matter, this argument is unavailing, for it is undisputed that the eve-of-litigation correspondence adverting to the buying program failed to identify any specifics as to either offending Tiffany listings or sellers. In Hendrickson, even though the evidence suggested that *all* of the listings at issue were infringing, the court ruled in favor of eBay because the plaintiff "had failed to put eBay on

[13] See also DX 81; PX 92; DX 93; 11/16/07 Tr. at 752:23-753:23 (Chesnut) (discussing, with eBay's innate limitations of not possessing the actual goods, "proactive steps . . . to go to the jewelry and watch areas and go look for Tiffany items or look for a different brand [and] look for highly suspicious activity"); 11/16/07 Tr. at 744:11-746:20 (Chesnut).

notice that *particular* advertisements," that is, eBay listings, were infringing. Hendrickson, 165 F. Supp. 2d at 1095 (emphasis added). Similarly, in Robespierre, the court indicated that its ruling in favor of eBay would have been warranted even if there had been evidence of a general nature "that there's some counterfeits in thousands, if not more, of the kinds of merchandise" of a trademark owner offered on eBay. Robespierre, March 29, 2006 Hearing Transcript at 7. See also eBay Mem. at 21-22.

The actual results of the buying programs were provided to eBay only during post-complaint discovery. On their own merits, the results lack probative value (even if one overlooks the numerous indicia of unreliability in the design and conduct of the programs,[14] and the inherent bias in a survey performed and judged by Tiffany and its counsel[15]). Initially, Tiffany concedes that the results of the buying programs were not intended to be extrapolated to any day outside the specific dates of the programs: "[George] Mantis has not and will not opine that on any given day, approximately 75% of the 'Tiffany' silver merchandise on eBay is counterfeit." Pl. in Limine Opp. at 4. See also 11/14/07 Tr. at 278:19-25, 279:14-18 (Mantis).

Relatedly, the search criteria for the buying programs did not include any parameter looking for "five or more" listings. See id. at 282:13-17; Mantis Decl. ¶ 8. Thus,

[14] It is striking the extent to which the buying programs deviated from Mr. Mantis's protocol. Mr. Mantis admitted that: (1) the sample size was not achieved; (2) not all items were purchased; (3) the 2004 program included the week before Valentine's Day even though the protocol stated that the program should not take place during holiday periods; (4) frequent mistakes were made in the steps that "must be followed" in deciding which items to purchase; (5) Mr. Mantis did not achieve the probability sample contemplated by his protocol; (6) it would be impossible "for all items to have a known, non-zero chance for selection"; and (7) it was not possible to calculate the confidence interval called for in the protocol. See 11/14/07 Tr. at 302:19-303:3, 298:7-8, 310:10-16, 303:8-304:3, 309:4-10, 298:23-300:16, 296:13-16 (Mantis); DX 266. See also Ericksen Decl. ¶¶ 53, 59-68, 72, 74, 78-85, 89-90.

[15] See Mantis Decl. ¶ 20. In addition, the search terms themselves were biased, since, as Mr. Mantis conceded, the criteria used were those utilized by Tiffany in attempting to narrow "items of interest" as part of its own policing efforts. See 11/14/07 Tr. at 282:20-24, 283:18-24, 284:6-12 (Mantis). See also Ericksen Decl. ¶¶ 33-35.

despite Tiffany's assertion that such quantities are the main indicator of fraud, the buying programs provide no probative information on that issue whatsoever. What is more, although Tiffany's claims in this case are directed toward the universe of Tiffany *silver* jewelry, the universe tested in the buying programs was limited to Tiffany "sterling," and the results cannot be extrapolated to provide any reliable evidence as to the "silver" universe. See 11/14/07 Tr. at 289:19-290:4, 290:21-291:2 (Mantis); Memorandum of Law in Support of Defendant's Motion in Limine to Exclude the Proposed Expert Testimony of George Mantis (filed October 6, 2006) at 11-12; Ericksen Decl. ¶¶ 47-57.

Most fundamentally, the buying programs do not reflect the number of potentially counterfeit Tiffany items available on a typical day in the "real world," because Tiffany entirely suspended its normal policing procedures during the programs. See 11/14/07 Tr. at 291:12-21 (Mantis); DX 266 at TCO 87125-26. See also Ericksen Decl. ¶¶ 36-38. During the periods surrounding the buying programs, Tiffany was reporting – and eBay routinely was removing – potentially counterfeit items; thus, the items identified by Tiffany during the buying programs would have been removed by eBay had they been reported. See, e.g., PX 1082. At most, the results of the buying programs tell one no more than what can occur in a world in which Tiffany abdicates its policing responsibilities – a wholly meaningless result.

3. Tiffany's artificial "five-or-more" rule

From the time of its demand letters and throughout this litigation, Tiffany has pressed upon eBay a so-called "five-or-more" bright-line test for infringement and has criticized eBay for "turn[ing] a blind eye" to Tiffany infringements as a result of eBay's alleged failure to take the "simple step" of "prohibit[ing] sellers of five or more 'Tiffany' items." Kowalski Decl. ¶¶ 18-20. Tiffany's posture in this regard is remarkable in light of both the ill-defined nature of its five-or-more test and the lack of record support for the notion that – however conceived – that test will "almost certainly" turn up counterfeit merchandise. Id. ¶ 18.

Much as Tiffany has vacillated throughout the litigation as to the essential nature of its grievance and the relief it seeks, see eBay Mem. at 9-10, it likewise has wavered as to the precise nature of its five-or-more rule. It thus has shifted between allegations that *all* Tiffany items sold in lots of five or more are presumptively counterfeit and that only lots of five or more pieces of Tiffany *jewelry* – or even Tiffany *silver jewelry* – are so implicated,[16] and between the assertion that the rule applies to all manner of Tiffany jewelry, new and old, and the claim that solely *new silver* Tiffany items are in issue.[17] The notion that either knowledge of infringing conduct or some duty to act thereon could be imputed to eBay from these ever-shifting conceptions is untenable.

Insofar as the five-or-more rule has any antecedent in Tiffany's practices, that history reveals that counterfeiting had nothing to do with the rule. The record shows that a practice of limiting retail sales of identical items in lots of five or more was instituted by Tiffany for a time, not as an anti-counterfeiting tool, but instead as an anti-diversion tool – that is, to guard against a secondary market in *authentic* goods. See, e.g., DX 169, 197; McGowan Deposition at 76:2-77:25. At that, the record demonstrates that, at least since 2005, the limit has grown to 25 items, see McGowan Deposition at 76:20-77:2 – and that even that limit is not regularly enforced. See 11/13/07 Tr. at 134:7-14 (Zalewska); 11/20/07 Tr. at 833:3-12 (Kowalski). The ready availability of multiples of five or more identical items undermines Tiffany's contention that sales of lots of five or more items inevitably entail counterfeiting.

[16] Compare Kowalski Decl. ¶¶ 18, 20 with Kowalski Decl. ¶ 21 with Plaintiffs' Responses and Objections to Defendant's Second Set of Interrogatories, Response Number 11 (DX 284).

[17] Compare Complaint ¶ 34 with Plaintiffs' Responses and Objections to Defendant's Second Set of Interrogatories, Response Number 11 (DX 284).

Whether or not Tiffany maintains tight controls on worldwide manufacturing and distribution, as it asserts, see PX 489; Kowalski Decl. ¶ 18, is therefore irrelevant. In any event, the record demonstrates that Tiffany's manufacturing and distribution channels are not nearly as tightly-controlled as Tiffany claims.[18] Tiffany in fact concedes that authentic Tiffany merchandise is sold outside its manufacturing and distribution channels. See Shibley Decl. ¶ 9; Chen Decl. ¶¶ 14-16; DX 170, 214-19, 250, 253. Moreover, at least one of Tiffany's third-party manufacturers resold excess authentic Tiffany merchandise that later was resold on eBay. See Zalewska Decl. ¶ 11; DX 222.

Not surprisingly in light of the foregoing, lots of five or more authentic Tiffany items, including silver jewelry, have been sold on eBay. See, e.g., DX 422 (showing that eBay user "30plus20" sold dozens of authentic silvery jewelry items on eBay); Zalewska Deposition at 64:2-8. At the same time, whenever Tiffany notifies eBay of listings of lots of five or more items believed to be counterfeit, eBay removes those listings. See 11/14/07 Tr. at 243:12-21 (Zalewska).

It is not surprising that Tiffany has now backed away from the significance of its five-or-more rule for this case. Mr. Kowalski as much as admitted its arbitrariness in advising the Court on the witness stand that the rule represented solely a "compromise" on which "undue focus" should not be placed. 11/20/07 Tr. at 817:3-11 (Kowalski).

4. Tiffany's flawed challenges to eBay's proactive measures

Tiffany's challenges to eBay's proactive anti-counterfeiting efforts are legally extraneous and, in any event, factually unfounded. As already discussed, courts uniformly have

[18] For example, Tiffany currently sells its merchandise – including in large quantities – to corporate accounts, to Tiffany employees, and for resale to independent retailers throughout much of the world. See Shibley Decl. ¶¶ 3, 9, 11; Chen Decl. ¶¶ 4-6; DX 149 at K-9; DX 150 at 11; Chen Deposition at 21:3-22:7.

held that entities like eBay have "no affirmative duty to take precautions against the sale of counterfeits"; in particular, "the 'reason to know' part of the standard for contributory liability . . . does not impose any duty to seek out and prevent violations." Hard Rock, 955 F.2d at 1149 (citations omitted). See also Hendrickson, 165 F. Supp. 2d at 1095; Lockheed Martin, 175 F.R.D. at 646; Robespierre, March 29, 2006 Hearing Transcript at 8-9; eBay PCL ¶¶ 19-22; eBay Mem. at 18-19; eBay Opp. at 2-5. Yet the sole purpose of the testimony of Dr. Gregory Piatetsky-Shapiro was to identify proactive efforts that, according to Tiffany, eBay should have undertaken to identify and root out infringing sellers or items. See Piatetsky-Shapiro Decl. ¶ 12. Since eBay had no legal obligation to monitor its website for potentially infringing Tiffany items, this testimony is irrelevant.

In any event, Dr. Piatetsky-Shapiro's testimony has no probative value. For one, he conceded that he was not opining on the adequacy of eBay's measures. See 11/14/07 Tr. at 345:2-5 (Piatetsky-Shapiro). To this point, Mr. Chesnut explained that Dr. Piatetsky-Shapiro's critique reflected fundamental misunderstandings and incomplete information as to eBay. See 11/16/07 Tr. at 748:24-750:15 (Chesnut) (testifying that Dr. Piatetsky-Shapiro was not "fully aware of the things we do," including that eBay "use[s] data mining extensively"). Nor is it apparent that Dr. Piatetsky-Shapiro's algorithm could be implemented on a continuous real-time basis, taking into account the millions of eBay listings and the needs of thousands of other rights holders. See 11/14/07 Tr. at 349:20-350:19, 351:6-352:4, 373:12-15 (Piatetsky-Shapiro).

Dr. Piatetsky-Shapiro also conceded that his methodology cannot actually identify counterfeit Tiffany items on eBay. See id. at 322:16-21, 323:20-21, 330:15-20, 326:6-19, 328:18, 376:3-11. Relatedly, his algorithm was based entirely on circular reasoning,[19] and even

[19] The "suspiciousness score" only reveals the extent to which sellers meet the criteria he identified as being suspicious, and the way he determined those criteria was by identifying those he thought would be effective in identifying suspicious sellers. See id. at 333:16-25.

if it were implemented, he admitted that it could be easily circumvented because fraudsters always adapt. See id. at 340:17-341:9. Perhaps for these reasons, Dr. Piatetsky-Shapiro testified that "it was not my intention that eBay would adopt this specific program as their ultimate program for detecting fraud." Id. at 341:7-9, 342:1-2, 372:16-17.

Notably, Dr. Piatetsky-Shapiro confirmed that Tiffany itself had the ability to use his algorithm just as he had used it, and that, had Tiffany asked, he would have allowed Tiffany to do so. See id. at 352:19-353:1, 366:12-16, 367:9-19. However, Tiffany never asked to use the algorithm to assist it in meeting its own policing obligations. See id. at 366:6-9.

IV. TIFFANY'S ATTEMPTED SHOWING OF "WILLFUL BLINDNESS" REVEALS INSTEAD EBAY'S SIGNIFICANT EFFORTS TO COMBAT INFRINGEMENT

The trial record fully and completely eviscerates any claim that eBay is "willfully blind" to potentially counterfeit Tiffany items on its website. The evidence demonstrates that eBay did *not* "suspect wrongdoing and deliberately fail to investigate." Hard Rock, 955 F.2d at 1149 (citation omitted).[20] To the contrary, the record concerning eBay's policies and practices shows them to be exemplars of good faith and of a diligent commitment to combating infringement on eBay. Even Tiffany's witnesses and counsel in the end concurred. Ms. Zalewska conceded at trial that she *never doubted eBay's good faith*. See 11/13/07 Tr. at 113:2-3 (Zalewska) ("Q. You never doubted eBay's good faith, did you? A. No."). During closing argument, Tiffany's counsel likewise retreated from his prior rhetoric, characterizing any counterfeiting on eBay as "inadvertent[]." See 11/20/07 Tr. at 901:16-18.

[20] Willful blindness "requires more than mere negligence or mistake" and does not lie where the defendant "did not know of a high probability of illegal conduct and purposefully contrive to avoid learning of it" or "did not fail to inquire further out of fear of the result of its inquiry." Nike, Inc. v. Variety Wholesalers, Inc., 274 F. Supp. 2d 1352, 1369-70 (S.D. Ga. 2003), aff'd mem., 03-14293, 107 Fed. Appx. 183 (11th Cir. May 3, 2004) (citation omitted). For a more complete discussion of the doctrine of willful blindness, eBay respectfully refers the Court to: eBay PCL ¶¶ 23-27; eBay Mem. at 20-22; eBay Opp. at 6-8.

Given the foregoing concessions and the additional evidence of eBay's good faith, even if the Court were to find that eBay committed trademark infringement (which, in any event, it should not), that infringement would be innocent. We previously discussed the provisions of the Lanham Act that limit relief against "innocent infringers" to what eBay already offers rights owners – namely, removal of listings reported to it. See eBay PCL ¶¶ 47-56; eBay Mem. at 25-30; eBay Opp. at 15-16. For this independent reason, Tiffany's claims must fail. See id.

A. eBay's Commitments of Resources to Anti-Counterfeiting

eBay has invested tens of millions of dollars in anti-counterfeiting initiatives because, as Mr. Chesnut testified, eBay "does not want counterfeits on the site and feels strongly about it." 11/16/07 Tr. at 686:14-15, 687:5-8 (Chesnut). In particular, eBay "is a business based on trust. . . . eBay's job is putting two strangers together to do a transaction, and so anything that causes people to be concerned about the quality of the item or whether it's real has a real impact on trust. . . . [B]eyond any legal obligation, we believe [counterfeiting is] something that we have to deal with." Id. at 689:2-14. See also DX 21.

In keeping with that philosophy, in any given year, eBay spends as much as $20 million on "tools" for trust and safety. See 11/16/07 Tr. at 687:21-25 (Chesnut). As one example, eBay devotes upwards of $5 million annually to maintaining and enhancing its fraud engine. See id. at 687:15-18. Fully one quarter of the total eBay/PayPal workforce of roughly 16,000 employees – more than 4,000 individuals around the world – is devoted to trust and safety. See id. at 691:18-692:7; Chesnut Decl. ¶ 20. More than 200 of these individuals focus exclusively on combating infringement, at a cost of "millions and millions of dollars." See 11/16/07 Tr. at 579:24-580:8, 687:9-14 (Chesnut). eBay also employs "approximately 70 people that do nothing all day but work with law enforcement." See id. at 599:1-2, 746:21-747:19; Chesnut Decl. ¶¶ 56-57. In several instances, information that eBay has provided to law enforcement agencies has led to the arrest of counterfeiters. See Chesnut Decl. ¶¶ 56-57.[21]

Aside from such expenditures to affirmatively combat infringing activity, eBay actually loses money when users purchase counterfeit items on its site. eBay commits "tens of millions of dollars" annually to pay claims through its buyer protection program, "and a number of counterfeit claims are paid every year that certainly contribute to a significant part of that expense." 11/16/07 Tr. at 688:1-5 (Chesnut).[22] More fundamentally, when users buy counterfeit goods on the site, they "are frequently quite upset with the experience," "don't come back at all or they reduce their activity on eBay," and "tell others about their bad experience." Id. at 688:6-25; Chesnut Decl. ¶¶ 2-3. Far from demonstrating any culpability, the foregoing record evidence underscores that eBay is committed to combating infringing activity and does not intend to profit in any way from sales of counterfeit items. See Chesnut Decl. ¶ 4; 11/16/07 Tr. at 686:18-687:7 (Chesnut); 11/15/07 Tr. at 502:7-22 (Briggs); Briggs Decl. ¶ 4.

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[21] In this regard – and for the additional reasons that eBay requires users to supply identifying information when registering, see Briggs Decl. ¶ 13, and provides users' identifying information to rights owners, see Chesnut Decl. ¶ 57 – Tiffany's claim that "eBay has created a forum where counterfeiters remain anonymous," Kowalski Decl. ¶ 29, is without merit.

[22] See also Chesnut Decl. ¶¶ 4, 58-60 (discussing eBay's buyer protection program); 11/15/07 Tr. at 515:12-17 (Briggs) (noting that the number of transactions that "result in a buyer contesting the sale" "is a fraction of a percent" of "the overall transactions on the site").

B. eBay's Fraud Engine

While eBay has no legal obligation to proactively monitor its website, it nevertheless has recognized that the interests of maximizing user satisfaction and trust in its site dictate doing what it practically can in this regard. See Chesnut Decl. ¶ 33. eBay thus has undertaken efforts to monitor listings, primarily through a "fraud engine" that employs between 10,000 and 30,000 searches (also referred to as "filters") designed to identify and flag listings containing indicia of blatant infringement or otherwise problematic activity. See 11/16/07 Tr. at 581:11-584:22 (Chesnut); Chesnut Decl. ¶¶ 34-37. See also DX 125, 135.

The fraud engine flags thousands of listings on a daily basis, see Chesnut Decl. ¶ 38, a task made all the more complex by the fact that six to seven million new listings are posted on eBay *every day*. See 11/16/07 Tr. at 660:4-17 (Chesnut). See also Briggs Decl. ¶ 9. Moreover, while some items – such as guns – are completely prohibited and thus require no judgment to remove, listings that may offer potentially infringing merchandise require a more in-depth review. See 11/16/07 Tr. at 582:23-584:17 (Chesnut). eBay's ultimate ability to make determinations as to infringement is limited by virtue of the fact that eBay never sees or inspects the merchandise in the listings on its site nor has the expertise of any rights owners. See Chesnut Decl. ¶ 41; Briggs Decl. ¶¶ 10-11. eBay's fraud engine thus produces many "false positives" – listings that are captured by eBay's filters for further review but that are ultimately determined not to violate any eBay policy. See 11/16/07 Tr. at 582:3-12, 655:5-8 (Chesnut). Nonetheless, eBay removes thousands of listings per month based on its review of listings captured by the fraud engine. See Chesnut Decl. ¶¶ 38-39. See also DX 13.

C. Suspensions of Users

eBay also takes action against sellers themselves. See Chesnut Decl. ¶¶ 46-52. eBay in fact "suspend[s] hundreds of thousands of sellers every year," tens of thousands of whom are suspended for having engaged in infringing conduct. 11/16/07 Tr. at 707:8-708:23 (Chesnut); Chesnut Decl. ¶ 51. See also DX 134 (providing data regarding suspensions); DX 15, 27, 100. Although eBay primarily employs a "three-strikes rule" for suspensions, a seller could be suspended on a first violation if it is determined that, for example, the seller "listed a number of infringing items," and "this appears to be the only thing they've come to eBay to do." 11/16/07 Tr. at 700:10-22 (Chesnut). See also id. at 589:25-591:6; Chesnut Decl. ¶¶ 48-49. In other circumstances, if a seller has listed a potentially infringing item but appears overall to be legitimate, "the infringing items are taken down, and the seller will be sent a warning on the first offense and given the educational information, [and] told that . . . if they do this again, they will be suspended from eBay." 11/16/07 Tr. at 700:23-701:10 (Chesnut).[23]

eBay's suspension policies, as with all of its anti-infringement measures, apply to every user, including PowerSellers, who "are held to the same rules as everyone else." Id. at 709:10-710:10; Chesnut Decl. ¶¶ 61-65. In this regard, as noted, eBay considers numerous factors in making suspensions; when evaluating PowerSellers, "their entire record is taken into account," and if it is determined that "they are in the business of infringement," they will be suspended, as more than 100 have been by Mr. Chesnut personally. See 11/16/07 Tr. at 709:10-710:10 (Chesnut); Chesnut Decl. ¶ 65.

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[23] Mr. Chesnut testified that eBay does not use "a hard-and-fast one-strike-and-you're-out rule" for a number of reasons. First, NOCIs are based on a good-faith determination by the rights owner, but they are "not an exact finding." In addition, particularly for the "hundreds of thousands of people that rely on eBay for their livelihood," "a suspension from eBay is a very serious matter." Sellers also "may be innocent infringers, and they may have thought [the item] was real, when, in fact, it wasn't. Or there may have been people who knew it was counterfeit, but didn't know it was wrong." Thus, "the goal would be to educate people about the law, explain to them what they were doing was wrong, and try to get them to change their behavior first before resorting to the ultimate 'you're off of our web site.'" 11/16/07 Tr. at 704:18-705:16 (Chesnut). See also id. at 705:17-706:9; Chesnut Decl. ¶¶ 47, 50-51; DX 15, 27, 100.

While Tiffany's witnesses have claimed "frustration" that Tiffany's requests for suspension of sellers have been "futile," Zalewska Decl. ¶ 44, Ms. Zalewska clarified on the stand that such frustration was a function solely of the fact that she was *unaware* of what remedial actions may have been taken against sellers, as opposed to any knowledge that eBay failed to deal appropriately with them. See 11/13/07 Tr. at 144:13-20 (Zalewska). Tiffany also has made much of its observation that a few sellers whose listings Tiffany previously reported occasionally reappear on the site. See Cacucciolo Decl. ¶¶ 42, 48; Zalewska Decl. ¶¶ 44, 59, 88. Yet at trial, Tiffany identified *only four instances* – out of 284,000 NOCIs since 2003 – where a seller whose listings Tiffany had reported reappeared on the site using the same user identification. See Cacucciolo Decl. ¶¶ 41-42; Zalewska Decl. ¶¶ 89-93; 11/13/07 Tr. at 149:25-150:3 (Zalewska). Even in those four instances, there is no evidence that eBay failed to take appropriate action against the seller consistent with eBay's practices and judgment.

Tiffany also purports to have identified in a spreadsheet (PX 1067) a total of 178 instances where "bad sellers" reappeared on the site using a different user identification. See Zalewska Decl. ¶¶ 97-110. This exhibit is of far less probative value than Tiffany would suggest. For one, it is rife with questionable or indeterminate entries. Many of the entries contain no date and/or appear to count a seller as having "reappeared" even though all of the seller's listings were reported on the same date, perhaps even within hours or minutes of each other. See PX 1067 at page 1 (sellers 1, 3, and 10). In its attempt to deduce common sellers based on name and contact information, Tiffany also has made several inappropriate assumptions. For example, on page 2 of the spreadsheet (seller 23), Tiffany appears to have concluded that two sellers named "Elizabeth West" represent the same person simply because they have the same name (albeit a common one) even though each Elizabeth West has a different user identification, email address, and mailing address. Tiffany also appears to assume that any two people with the same street number represent the same seller, even if they live in a city and may very well reside in an apartment complex. See, e.g., id. at page 3 (seller 34).[24]

Neither does PX 1067 reveal the disciplinary measures that eBay may have taken as to the listed sellers. As noted, for a variety of legitimate reasons, eBay does not automatically or permanently suspend all sellers who commit a first, or perhaps a second, offense.[25] The law unequivocally supports eBay in this regard. In Hendrickson, for example, the court credited eBay's evidence that it suspended "repeat offenders." Hendrickson, 165 F. Supp. 2d at 1091 n.9. Similarly, in Winback and Haugen, the courts based their findings that there could be no contributory liability on the fact that the defendants, while not having severed all ties with the alleged direct infringers, made other efforts to remediate the infringing conduct. See Winback, 42 F.3d at 1433 n.14 ("[I]n the instances where [AT&T] brought objectionable acts of the sales representatives to the attention of [defendant], [defendant] took appropriate steps to reprimand and discipline the sales representative.") (quotation marks and citation omitted); Haugen, 317

[24] Mr. Chesnut testified that when suspending users, eBay looks for and takes action on related user accounts. See 11/16/07 Tr. at 701:25-702:2 (Chesnut). However, it is "not uncommon for people on eBay to have more than one account." Id. at 701:20-21. For example, users may have one account for one type of goods and another account for other types of goods; family members also may have different accounts. See id. at 701:21-24. eBay also undertakes efforts to prevent suspended users from returning to the site, and it has spent about $10 million on developing mechanisms to do so. See id. at 702:8-703:14; Chesnut Decl. ¶ 52; DX 44.

[25] Tiffany would prefer, without basis, that every seller be permanently suspended upon a first offense. Along with each and every NOCI that Tiffany's Maria Cacucciolo submits, she requests that eBay suspend the relevant seller. See Cacucciolo Decl. ¶¶ 9, 24, 25, 48.

F.3d at 1129-30 (upon learning of third party's offending message that gave rise to Lanham Act claim, defendant suggested that the third party issue a retraction).[26]

The discretion the law affords eBay is particularly appropriate given that Tiffany reports listings to eBay only on a good-faith basis and in fact has been mistaken. Indeed, Tiffany has misreported listings as counterfeit, only to later request reinstatement. See, e.g., DX 34, 270; Zalewska Deposition at 90:18-90:21. Tiffany's mistakes are not surprising given that, despite eBay's good-faith requirement, Tiffany apparently does not review each listing that it reports to eBay. See Zalewska Decl. at n.4, n.9. The record also reveals the misleading nature of Tiffany's claim that it has erroneously reported listings only on three occasions. See 11/13/07 Tr. at 120:15-121:24 (Zalewska) (conceding that Tiffany's claim was based on its "failure, except in three instances, to have anybody . . . conclusively refute the presumptive determination" that the reported listings contained counterfeit items). On numerous occasions, sellers have complained to Tiffany that their items were inappropriately reported only to have Tiffany refuse to offer any meaningful way of validating their legitimacy. See DX 157, 167, 175. See also 11/16/07 Tr. at

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[26] In circumstances that shed further light on the record here, courts addressing copyright infringement claims under the Digital Millennium Copyright Act ("DMCA") have emphasized that the DMCA's "repeat infringer" provision gives defendants flexibility in crafting remedial measures for directly infringing conduct. See 17 U.S.C. § 512(i)(1)(A). See also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109 (9th Cir. 2007), cert. denied, 2007 WL 2455134 (Dec. 3, 2007) ("The statute permits service providers to implement a variety of procedures, but an implementation is reasonable if, under 'appropriate circumstances,' the service provider terminates users who repeatedly or blatantly infringe copyright."). On facts similar to those here, the court in Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004), thus held that Amazon's policies were reasonable because Amazon, among other things: required users to agree to the terms of a "Participation Agreement" that prohibited infringement; removed millions of offending listings; and permanently suspended users "for egregious or repeated violations." Id. at 1101-03. The court also rejected arguments that mirror those raised by Tiffany here. The court thus did not fault Amazon for not differentiating which of its actions were taken with respect to infringement versus other violations because "[t]he evidence . . . indicates that Amazon does respond to allegations of copyright infringement." Id. at 1103. Nor was the court troubled by the fact that Amazon had "not been able to prevent certain vendors from reappearing . . . under pseudonyms" because "[a]n infringement policy need not be perfect; it need only be reasonably implemented." Id.

711:14-712:1 (Chesnut) (eBay has "confronted a large number of very angry and emotional sellers who feel that their . . . legitimate businesses have been severely impacted because out of the blue listings have been pulled down and they've been suspended").

D. Tiffany's Red Herrings

Confronted with an insurmountable record demonstrating eBay's overall good faith in combating infringing activity on its site, Tiffany points to a hodgepodge of other evidence as somehow supporting liability. None of the evidence – regarding eBay's recent additional anti-fraud initiatives, eBay's "assistance" to its sellers, tracking of brands by eBay, and the testimony of Tiffany's four third-party witnesses – remotely supports Tiffany's case.

1. eBay's recent additional anti-fraud initiatives

Tiffany appears to contend that eBay could be considered "willfully blind" to infringement insofar as the additional anti-fraud initiatives that eBay implemented in late 2006 allegedly could have been implemented earlier. This theory is deeply flawed.[27] As a legal matter, eBay's new measures are of no consequence because they are all proactive in nature, and therefore eBay did not have an obligation to implement them in the first place. See Hard Rock, 955 F.2d at 1149; Lockheed Martin, 175 F.R.D. at 646.

In any event, Tiffany has not proven that eBay feasibly could have implemented the new initiatives at an earlier stage. In particular, Dr. Piatetsky-Shapiro, who himself has never worked on the implementation of real-time systems, see 11/14/07 Tr. at 350:14-15 (Piatetsky-Shapiro), based his algorithm on "one snapshot in time" and failed to address the extent to which eBay could implement his algorithm on a continuous real-time basis, taking into account the millions of eBay listings and the needs of other rights holders. See id. at 349:20-1.

[27] Pursuant to the Court's prior ruling, Tiffany is prohibited from arguing that eBay's implementation of new measures demonstrates its culpability. See Fed. R. Evid. 407.

Dr. Piatetsky-Shapiro conceded that implementing a system on a real-time basis places a greater strain on hardware resources, see id. at 350:16-19, and did not know the impact on eBay's systems that would result from implementing the measures he proposed, see id. at 351:6-352:4.

Rather, the evidence shows that many of eBay's new initiatives could not have been implemented at an earlier time – and certainly not in combination with other initiatives such that the overall set of initiatives would work efficaciously. See, e.g., 11/16/07 Tr. at 657:16-17 (Chesnut) (testifying that eBay lacked the capability to impose quantity limits on listings of Tiffany items; "The quantity part is the hard part. That was the part that we couldn't do back in '03, '04, and '05."); id. at 665:12-666:12 (until recently, when a listing was flagged, allowing CSRs to review the seller's other listings was "not something the system could generate"); id. at 738:24-740:20 (testifying that each measure needed to be implemented in conjunction with other measures in order to be effective).[28] Far from Dr. Piatetsky-Shapiro's "snapshot in time," eBay is "without precedent on the [I]nternet." 11/16/07 Tr. at 728:11-23, 729:4-730:10 (Chesnut). As Mr. Chesnut testified:

> [B]ecause of the nature of our systems, our systems usually push the edge of what was technologically capable, because our systems . . . were I think practically unique in terms of the loads that they placed on our computer systems. Our servers and our system would actually crash and our systems had come down in the past, because we reached, our site had reached the end of what was technically feasible to do. I can tell you as a whole as a company we pushed the envelope about what was available technologically.

Id. at 765:8-17.

[28] To the extent additional measures could have been implemented, moreover, they could not have been implemented for all rights owners. See id. at 662:24-663:11 ("Could it have been done on a wide scale each with hundreds or thousands of rights owners each having their own filters? That would not have been possible.").

2. eBay's "assistance" to sellers

Tiffany's focus on the "assistance" that eBay provides to its users, including sellers, takes the Court down another legal blind alley. Tiffany has failed to show that this assistance is designed to or does lead to any listings for counterfeit Tiffany merchandise. Mr. Briggs testified directly to the contrary: "In contrast to that, we make clear in the user agreement that this is against the law, not permitted; it's not in the long-term interest of our company to allow that." 11/15/07 Tr. at 490:10-17 (Briggs). The evidence thus shows that a core component of eBay's assistance is to enable users to list *only non-infringing items*. See, e.g., id. at 436:5-438:18. See also id. at 420:4-8 ("the primary objective" regarding sellers is "to grow what I would call healthy sellers . . . and thereby build a long-term healthy business on eBay"); Briggs Decl ¶ 21 ("With respect to the Jewelry & Watches category, for example, eBay has worked with sellers to educate them and have them adopt 'best practices' regarding the items they offer for sale."). eBay also has implemented policies prohibiting listings of counterfeit items and educational measures to prevent such listings. See, e.g., DX 77 (eBay user agreement); 11/15/07 Tr. at 492:1-493:11 (Briggs); Briggs Decl. ¶ 13; Chesnut Decl. ¶¶ 40-45; DX 60 ("Replica and Counterfeit Items" policy).

Courts in similar circumstances have refused to find contributory infringement when the evidence – such as Plaintiffs' Exhibit 51, a newsletter for sellers that discusses VeRO and additional trust and safety issues, see 11/15/07 Tr. at 436:5-438:18 (Briggs) – showed that a central purpose of any such "contributions" was to discourage or prevent infringing activity. See Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 1246-47 (11th Cir. 2007) (finding "no evidence in the record of [defendant's] 'knowing participation' in the alleged direct infringements" because defendant took steps to minimize infringements, including by issuing warnings and by "work[ing] to ensure that the problem was rectified"); Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 713 (9th Cir. 1999) (finding no "knowledge of others' infringing use" because of defendant's disclosures and accurate representations to customers); Medic Alert, 43 F. Supp. 2d at 940 (holding that defendant lacked knowledge or reason to know of infringements "[i]n light of [defendant's] end-user agreement").

With respect to eBay itself, courts in a variety of contexts have attached no adverse legal significance to the tools it offers. See Hendrickson, 165 F. Supp. 2d at 1087 (rejecting plaintiff's argument "that eBay participated in and facilitated [infringement] by providing an online forum, tools and services to the third party sellers"); Stoner v. eBay Inc., 56 U.S.P.Q. 2d 1852, 1853-54 (Cal. Super. Ct. 2000) (noting that "[p]laintiff points to several other features of eBay's service which he contends transform defendant from a mere computer services provider to an active participant in the sale of the auctioned goods and services" but holding that none of the features gave rise to liability; adding that "[t]hese additional features are available with respect to all goods and services auctioned – they are not limited to recordings, much less to illegal recordings").

3. Tracking by brand

Tiffany also would make much of the fact that eBay's systems generally did not allow for tracking by brand, from which Tiffany apparently seeks to draw the unwarranted inference that eBay must have failed to apply its anti-counterfeiting measures to Tiffany listings. The evidence is directly to the contrary. In fact, the record shows that eBay has taken countless actions with respect to listings of potentially counterfeit Tiffany items and sellers of those items, see, e.g., 11/16/07 Tr. at 597:20-23 (Chesnut), and further shows that eBay applies its rules and anti-counterfeiting measures even-handedly and with full force as to listings of Tiffany merchandise, see id. at 711:1-9 ("[T]here's not a separate rule of Tiffany as opposed to other brand owners.").

4. Tiffany's third-party witnesses

Tiffany's four so-called "confusion" witnesses are irrelevant to this litigation. What matters is whether and how eBay has responded with respect to specifically-identified instances of infringing activity, and the record establishes overwhelmingly that eBay meets – and exceeds – its legal obligations in that regard. If anything, these third-party witnesses reinforce that eBay has exercised overall good faith and diligence in addressing potentially infringing items on its site. For example, Sheila Sharp, who was the subject of an account takeover, acknowledged that: eBay informed her that "it was canceling all the unauthorized listings on my eBay account" (Sharp Decl. ¶ 9); a subsequent search revealed "those listings had been removed" (id. ¶ 7); she "contacted eBay with my suspicion" as to additional fraudulent listings and "within an hour they had cancelled them all" (PX 237); in addition, "PayPal was extremely helpful" in providing further assistance (Sharp Decl. ¶ 8); and PayPal "was able to track the account to which these payments were being sent and have closed it" (PX 239).[29]

* * *

In sum, Tiffany simply has not met its burden of proving that eBay has been willfully blind. Instead, the evidence highlights the dramatic differences between eBay's practices with respect to potentially infringing items and the conduct of the defendants in Hard Rock and Fonovisa, on which Tiffany so heavily and inappropriately relies.[30] Far from "clos[ing its] eyes to infringement," Days Inns Worldwide, Inc. v. Lincoln Park Hotels, Inc., No. 06 C 2960, 2007 WL 551570, at *7 (N.D. Ill. Feb. 22, 2007), eBay has been a model citizen in the effort to staunch infringements on its site.

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[29] The remaining witnesses similarly are of no assistance to Tiffany. Elizabeth Badart received a refund from PayPal for the items she purchased (at a price on eBay, Ms. Badart further stated, that "did not make me suspicious"). See Badart Decl. ¶¶ 5, 14, 20-21. She also received that refund without having ever submitted the authenticity paperwork that eBay generally asks for. See id. The documentation related to Ms. Badart's circumstances show that she recognized the diligence of eBay and PayPal; in one representative email, Ms. Badart commented: "Thanks for the prompt reply." PX 953. Next, Patricia Anne Byron is not a lost sale for Tiffany, as she expressly noted that she would not have purchased items at full retail price. See Byron Decl. ¶ 3. Finally, Wendy LaHood concedes that rather than pursuing a buyer protection claim, she accepted an offer from Tiffany's counsel to provide as evidence in this proceeding the item she purchased *in exchange for Tiffany paying her* the cost of that item. See LaHood Decl. ¶¶ 9-13.

V. TIFFANY'S REMAINING CLAIMS EQUALLY FAIL AS A MATTER OF LAW AND RECORD EVIDENCE

With respect to Tiffany's remaining claims, we address here a few salient points in light of the evidence adduced at trial, and respectfully refer the Court to eBay's pretrial filings for a further discussion. See eBay PCL ¶¶ 30-56; eBay Mem. at 23-25; eBay Opp. at 13-14.

A. Tiffany's Advertising-Related Claims

The trial record has demonstrated that Tiffany cannot prevail on any of its challenges to certain of eBay's advertising practices. First, with respect to all of eBay's advertising efforts, eBay is entitled to inform third parties of the availability of listings of Tiffany merchandise on its website. See New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992) ("Such nominative use of a mark – where the only word reasonably available to describe a particular thing is pressed into service – lies outside the strictures of trademark law.") (emphasis omitted).[31] eBay does not become liable for direct infringement merely because, unknown to eBay, one or more of such listings may offer for sale counterfeit goods. It would be particularly inappropriate to impose such liability where, as discussed above, there is no basis to impose *contributory liability on the underlying claims* – the only reason, by way of the alleged existence of potentially counterfeit Tiffany merchandise on eBay, the advertising-related allegations exist in the first place. See Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 415-16, reconsideration denied, 431 F. Supp. 2d 425 (S.D.N.Y. 2006) ("there is nothing improper with defendants' purchase of sponsored links" when "defendants actually sell [plaintiff's products] . . . on their website").

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[30] See Hard Rock, 955 F.2d 1143; Fonovisa, 76 F.3d 259. For a more complete discussion of Hard Rock and Fonovisa, eBay respectfully refers the Court to eBay Opp. at 6-8.

[31] Relatedly, Tiffany cannot prevent owners of authentic Tiffany merchandise from reselling those goods on eBay. See Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61-62 (2d Cir. 1992) ("trademark law does not reach the sale of genuine goods bearing a true mark even though the sale is not authorized by the mark owner"). See also eBay PCL ¶¶ 57-63 (discussing additional trademark and First Amendment principles).

Additionally, Tiffany has conceded that eBay stopped using promotional features referencing Tiffany merchandise on its site and stopped purchasing the Tiffany keyword as part of sponsored links. eBay ceased both practices in response to Tiffany's requests and in the spirit of cooperation with a rights owner. See Briggs Decl. ¶¶ 24, 30-32; 11/15/07 Tr. at 467:14-468:1, 471:21-24 (Briggs). See also Cooper Deposition at 73:7-74:11; DX 36, 68, 70, 71, 72, 141, 142, 143.[32] Indeed, years have passed since the challenged activities occurred.[33]

Tiffany likewise cannot predicate liability on the fact that third-party "affiliates" have purchased the Tiffany keyword for sponsored links. Initially, this issue is not properly before the Court because Tiffany never alleged such claims in its complaint nor in the parties' joint pretrial order. Just as Tiffany could not after-the-fact seek to impose liability based upon trademarks it had never previously identified, so too this eleventh-hour addition to the case should be barred. See Tiffany (NJ) Inc. v. eBay Inc., No. 04 CIV 4607 (RJS), slip op. (S.D.N.Y. Nov. 9, 2007) at 2-4 (stating that "Tiffany should, at the very least, have noted their intent to litigate the New Marks in its Pretrial Order").

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[32] With respect to sponsored links in particular, eBay's decision to no longer purchase the Tiffany keyword means that it has foregone not just legitimate advertising of the merchandise at issue in this litigation but also advertising of any other goods relating to "Tiffany," such as the pop singer Tiffany. See 11/15/07 Tr. at 486:5-487:5 (Briggs).

[33] More than three years have elapsed, and these claims are now moot. See Ford v. Reynolds, 326 F. Supp. 2d 392, 405 (E.D.N.Y. 2004).

In any event, the record shows that eBay itself did not make these purchases, had no role in the purchases, and had no knowledge of the purchases. See Briggs Decl. ¶¶ 34-35; 11/15/07 Tr. at 473:10-16 (Briggs) ("There is no report that we see . . . that indicates what words our affiliates are buying."). Rather, the purchases were entirely and exclusively in the control of the affiliates. eBay thus cannot be deemed to have "used" the Tiffany trademarks "in commerce" – a core requirement for imposition of trademark liability. "In order to prevail on a trademark infringement claim for registered trademarks . . . , a plaintiff must establish that . . . the defendant used the mark . . . in commerce." 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 406-07 (2d Cir. 2005). See also Charles Atlas, Ltd. v. DC Comics, Inc., 112 F. Supp. 2d 330, 336 (S.D.N.Y. 2000) ("Only a 'person who, on or in connection with any goods or services, or any container for goods, uses in commerce' a trademark or false designation of origin, can be found liable for trademark infringement.") (quoting 15 U.S.C. § 1125(a)). Tiffany has adduced no evidence that *eBay*, as opposed to independent third-party affiliates, used the Tiffany trademarks in commerce when these affiliates were purchasing the Tiffany keyword.[34]

As evidenced by counsel's questioning of Mr. Briggs, Tiffany apparently also now seeks to hold eBay liable as a result of automatically-generated features on its website that list, for example, "top-searched items" on eBay. See, e.g., 11/15/07 Tr. at 457:20-458:2 (Briggs) ("Again, I believe it's just an auto-generated list of what our buyers were putting into the search engine on the site."); id. at 449:21-23, 462:23-25, 455:18-25. As with Tiffany's belated contention regarding affiliate-purchased sponsored links, this issue – having never been pled in Tiffany's complaint nor raised in the parties' joint pretrial order – is not properly before the Court. See Tiffany (NJ) Inc. v. eBay Inc., No. 04 CIV 4607 (RJS), slip op. at 2-4.

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[34] For business reasons, eBay recently prohibited affiliates from purchasing any sponsored links in the United States. See Briggs Decl. ¶ 35. While Tiffany's counsel tried to suggest some conscious decision by eBay to continue to allow affiliates to purchase the Tiffany keyword when it ceased doing so directly, Mr. Briggs refuted that proposition: "I don't believe it really came up in discussion regarding that." 11/15/07 Tr. at 471:12-19 (Briggs). Tiffany's claimed protestations are further undermined by the fact that Tiffany never requested that eBay ask the affiliates to stop buying the Tiffany keyword. See id. at 490:6-10. And even after learning at the deposition of Google's Chris Cooper that, by sending a letter to Google, Tiffany could prevent the purchase of Tiffany keywords by affiliates, Tiffany chose never to send such a letter. See Cooper Deposition at 92:21-93:24.

Tiffany's claims premised on such automatically-generated features on the eBay website are, in any case, legally groundless. As Mr. Briggs explained, these features are automated, involving no volitional activity by eBay. Courts have rejected such claims in similar circumstances. See Parker v. Google, Inc., 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006), aff'd mem., No. 06-3074, 2007 WL 1989660 (3d Cir. July 10, 2007) ("When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing. The automatic activity of Google's search engine is analogous. It is clear that Google's automatic archiving of USENET postings and excerpting of websites in its results to users' search queries do not include the necessary volitional element to constitute direct copyright infringement.").

As a final matter, in a truly off-point assertion, Tiffany posits in connection with its advertising-related claims that eBay is directly liable for infringement "[j]ust as an officer or employee of a store selling infringing merchandise is jointly and severally liable with the store for that infringing sale." Tiffany PCL ¶ 17 (citing Gucci Am., Inc. v. Exclusive Imports Int'l, No. 99 Civ. 11490 (RCC), 2007 WL 840128, at *6 (S.D.N.Y. Mar. 19, 2007)). This is wrong. Aside from having now been vacated as a result of settlement, see Gucci Am., Inc. v. Exclusive Imports Int'l, No. Civ. A. 99-11490 (CMF), 2007 WL 2892668 (S.D.N.Y. Oct. 2, 2007), Gucci is easily distinguishable – the defendants there themselves traded in the counterfeit goods at issue, including by acting as a selling agent, offering to sell the watches, acquiring the watches for further sale, communicating the offer for sale, and providing instructions regarding the watches. See Gucci, 2007 WL 840128, at *1, *6.[35] Tiffany can establish no remotely comparable facts here, where Tiffany concedes that eBay "does not directly sell the counterfeit Tiffany merchandise to buyers." See Tiffany PCL ¶ 17.

B. The Rest of Tiffany's Claims

All of Tiffany's remaining claims fail for the reasons articulated in eBay's pretrial filings; Tiffany has proffered no evidence to change that outcome. See eBay PCL ¶¶ 30-56; eBay Mem. at 23-25; eBay Opp. at 13-14. We point out here one notable decision recently issued that bears on Tiffany's remaining claims. As discussed in eBay's pretrial filings, Section 230 of the Communications Decency Act, 47 U.S.C. § 230, immunizes eBay against all of Tiffany's state-law claims. See eBay PCL ¶¶ 42-46; eBay Mem. at 24-25; eBay Opp. at 13-14. The Ninth Circuit in Perfect 10, Inc. v. CCBill, Inc., 481 F.3d 751, 767-68 (9th Cir. 2007), specifically held that Section 230 applies with full force to state-law intellectual property claims. Since the parties' submissions of their pretrial filings, the Ninth Circuit, in denying a motion for reconsideration, amended that decision for the sole purpose of reinforcing its prior holding, concluding that allowing any exemption for state-law intellectual property claims "would fatally undermine the broad grant of immunity provided by the CDA." CCBill, 488 F.3d at 1107-08.

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[35] Equally inapposite are the remaining cases cited by Tiffany. See Tiffany PCL ¶ 19. In Gucci Am., Inc. v. Duty Free Apparel, Ltd., 286 F. Supp. 2d 284 (S.D.N.Y. 2003), one of the defendants sold the counterfeit goods, and that defendant acquired the goods from the other defendant, id. at 284-85, leading the court to conclude that "Defendants sold those items," id. at 287-88. In Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 147 (4th Cir. 1987), the corporate defendant was found liable for "making and selling the offending goods," as were that defendant's president and an employee "involved in the sale of" those goods. In Topps Co., Inc. v. Gerrit J. Verburg Co., No. 96 Civ. 7302 (RWS), 1996 WL 719381, at *1-3 (S.D.N.Y. Dec. 13, 1996), the defendant itself developed, designed, and sold the infringing product.

CONCLUSION

For the foregoing reasons, eBay respectfully requests that the Court enter judgment in eBay's favor on each of Tiffany's claims.

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